

Environmental Quality Commission

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Commonwealth of Kentucky Environmental Quality Commission

14 Reilly Road
Frankfort, Kentucky 40601-1132

Ernie Fletcher
Governor

LaJuana S. Wilcher
Secretary
Environmental and Public
Protection Cabinet

MEMORANDUM

TO: Governor Ernie Fletcher

LaJuana Wilcher, Secretary
Environmental and Public Protection Cabinet

FROM: Leslie Cole, Executive Director
Environmental Quality Commission

DATE: Dec. 31, 2003

RE: Environmental Quality Commission Regulatory Recommendation

Attached is a regulatory recommendation passed by the Kentucky Environmental Quality Commission (EQC) at its public meeting held on Dec. 18, 2003. The commission took action on the Kentucky Division of Water proposed water quality standards. EQC approved the proposed amendments with the exception of 401KAR 5:030 pertaining to the antidegradation policy. EQC recommended rejection of this regulation citing that the number of exceptions contained in the regulation are not supported by evidence and may not meet the requirements of the Clean Water Act.

Please feel free to contact the commission if you have any questions concerning this recommendation.

RECOMMENDATION of the KENTUCKY ENVIRONMENTAL QUALITY COMMISSION

Pursuant to KRS 224.01-100 through 224.01-115, the Environmental Quality Commission shall have the power, duty and authority to:

Recommend adoption or rejection by a majority of its membership present and voting of any proposal by the cabinet to adopt, modify or revoke any rule or regulation pertaining to the prevention, abatement and control of existing or threatened air or water pollution, disposal of waste, control of noise, or the use of air, land, or water resources, or strip mining and reclamation. The Commission shall tender in writing, its recommendation of adoption or rejection. If the Cabinet adopts any matter upon the Commission's recommendation of rejection, the Secretary shall file with the Commission a statement of the reason therefore.

Therefore, on December 18, 2003:

- 1) The Environmental Quality Commission voted to recommend **adoption** of the Kentucky Division of Water proposed regulatory amendments:

401 KAR 5:002. Definitions for 401 KAR Chapter 5.
401 KAR 5:026. Designation of uses of surface waters.
401 KAR 5:029. General provisions.
401 KAR 5:031. Surface water standards.

- 2) The Environmental Quality Commission voted to recommend **rejection** of the Kentucky Division of Water proposed regulatory amendment:

401 KAR 5:030. Antidegradation policy implementation methodology.

On the grounds that justification for the various exemptions/variances to Kentucky's antidegradation policy were not supported by evidence and may not meet the requirements of the Clean Water Act. These include storm water discharges, coal mining discharges subject to the Surface Mining Reclamation and Control Act, domestic sewage discharges from single-family residences, concentrated animal feeding operations, publicly owned treatment works and KPDES permit renewals that result in less than a 20 percent increase in pollutant loadings from the previously permitted loading.

EQC cited an Aug. 29, 2003 ruling by the United States District Court for the Southern District of West Virginia that stated "EPA acted arbitrarily and capriciously in approving West Virginia's antidegradation procedures" and that "EPA failed to ensure, in a number of respects, that West Virginia's antidegradation implementation procedures were consistent with minimum federal requirements." The plaintiffs had argued that the policy allowed too many exemptions and loopholes to be consistent with the requirements of the Clean Water Act. The ruling has placed the burden of proof on the delegated permitting authority to demonstrate discharges that degrade water quality are necessary. See http://www.ohvec.org/issues/mountaintop_removal/articles/antideg.